Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

No. 176.

Brf. of Newberry for Appellee

Filed Jan. 15, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 176.

EDWARD B. WESLEY, APPELLANT,

vs.

HOWARD P. EELLS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

STATEMENT ON BEHALF OF HOWARD P. EELLS, APPELLEE, ON MOTION OF J. D. M. SHAW FOR LEAVE TO FILE BRIEF AND SUBMIT ARGUMENT.

A. ST. J. NEWBERRY,
Counsel for Howard P. Eells, Appellee.

(17,237.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1-15-1900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1899.

No. 176.

EDWARD B. WESLEY, APPELLANT,

vs.

HOWARD P. EELLS.

Now comes Howard P. Eells, appellee above named, by A. St. J. Newberry, his counsel, and files the following statement upon the motion of J. D. M. Shaw, to wit:

STATEMENT.

It is not true that this case is a collusive effort by the parties thereto to have this court, in an agreed case between them, decide an alleged liability of the State of South Carolina.

On or about the 24th day of October, A. D. 1897, this appellee entered into a *bona fide* contract with the appellant to buy from him the premises in the bill described. In such contract the appellant covenanted that said property was free and clear from any encumbrance.

Immediately thereafter this appellee investigated the title to said premises and discovered that there was on record a large mortgage in favor of the State of South Carolina unsatisfied and uncancelled. He thereupon communicated with the counsel for appellant, who claimed that the mortgage was satisfied and discharged by a tender of revenue bond scrip, as alleged in the original bill in this action. Thereupon this appellee notified the appellant that he would not purchase the premises on account of the existence of said mortgage.

Shortly thereafter this action was brought and was duly submitted to the circuit court, on an agreed statement of facts, on the 5th day of February, A. D. 1898.

On account of the illness of the district judge for the northern district of Ohio, no decision was rendered in said cause until on or about the 14th day of November, A. D. 1898, at which time judgment was rendered in favor of the appellee.

Some time during the summer of 1898 the appellee was first informed that some action had been taken by the officers of the State of South Carolina toward cancelling the mortgage, and was at the same time advised by his counsel that it was at least doubtful whether such a cancellation by the officers of the State of South Carolina, without any actual consideration, was valid, and would make the title to the premises clear as against the State of South Carolina. He was also advised that a decision of the circuit court in his favor in this cause would terminate all his liability upon the contract, and that a decision of the circuit court in favor of the complainant in this cause would finally and conclusively dispose of the lien of the mortgage. At that time the ap-

pellee did not, nor does he now, desire to purchase the property in question, partly because his business circumstances and conditions have changed, and partly because he has become convinced that the State of South Carolina does not offer a desirable or safe field for investment.

On or about the 9th day of December, A. D. 1899, Mr. William A. Barber, counsel for appellant on this motion, began a correspondence with Mr. A. St. J. Newberry, counsel for this appellee, copies of all which letters are hereto attached, in which the counsel for the appellee, with his approval, agreed that Mr. Barber might prepare such briof as he desired in support of the decision of the circuit court, and submit the same to him, and that after examination consent would be given to the filing of said brief, unless it were manifestly improper.

The appellee is perfectly willing to have Mr. Barber, or any other party honestly interested in the results of this action, file a proper brief in support of the decision of the circuit court, so that this honorable court may render its decision in the light of all such information and authority as can be furnished; but appellee submits that the purpose of the motion and of the party filing the same is manifestly not that this honorable court may be fully advised as to law and facts, and therefore render a proper decision in the case, but to induce this court to render no decision whatever, and to sacrifice the rights of the parties in this cause, because the State of South Carolina fears that by the decision of this honorable court in this cause it may possibly be compelled to meet some obligations which it might otherwise escape.

All of which is respectfully submitted.

HOWARD P. EELLS, *Appellee.*

A. ST. J. NEWBERRY, *His Counsel.*

STATE OF OHIO, *Cuyahoga County,* } ss:

A. St. J. Newberry, being duly sworn, says that he is the duly authorized attorney of said Howard P. Eells, appellee; that said Howard P. Eells is a resident and citizen of the State of Ohio and is now absent from said State, and that all the statements and allegations in the foregoing statement contained are true except such as are stated to be on information and belief, and as to these he believes them to be true.

A. ST. J. NEWBERRY.

Sworn to before me by the said A. St. J. Newberry and by him subscribed in my presence this twelfth day of January, A. D. 1900.

[SEAL.] E. J. MAGUIRE,
Notary Public.

DECEMBER 9, 1899.

A. ST. J. NEWBERRY, Esq.,
Atwater Building, Cleveland, Ohio.

MY DEAR SIR: I note your appearance as counsel of record for the appellee in the case of Edward B. Wesley, appellant, *vs.* Howard P. Eells, No. 176, October term, 1899, in the Supreme Court of the United States. The issue involved in this case, as appears from the transcript of record, is such that its determination by the Supreme Court will manifestly affect the interest of many persons not parties to the suit.

I trust, therefore, that you will see, in the very nature of the case, my warrant for asking your consent that I file such brief and be heard to present such motion and argument in support of the conclusion of the circuit court as the interests of those whom I represent may suggest. This is the courtesy I desire to ask. I beg to assure you that I have no

desire to interfere in any way with the orderly progress of the cause.

Will you kindly favor me with a reply at your earliest convenience, and I shall be greatly obliged.

Yours very truly, WM. A. BARBER.

(Copy.)

CLEVELAND, O., *December* 11, 1899.

WILLIAM A. BARBER, Esq.,
35 *Nassau Street, New York City.*

DEAR SIR: Your favor of the 9th instant, in regard to the case of Edward P. Wesley *vs.* Howard P. Eells, and in which you ask the privilege of filing brief and appearing and presenting motion and argument in support of the conclusions of the circuit court, is received and contents are carefully noted.

Personally I see no objections to permitting you to do this, and when my client returns to this city, which will be within a very few days, I will submit the matter to him, and if he has no objection, will so advise you.

Before agreeing to this, however, we will wish to know who you represent and just what motion and argument you desire to offer. Please advise me at once about this, so that I may lay the whole matter before my client.

Truly yours,

(Signed) A. ST. J. NEWBERRY.

DEC. 13, 1899.

A. ST. J. NEWBERRY, Esq.,
Atwater Building, Cleveland, Ohio.

MY DEAR SIR: Replying to your letter of December 11th, relative to the case of E. B. Wesley *vs.* Howard P. Eells, I beg to say that I represent a citizen tax-payer of South

Carolina, who, on behalf of himself only, desires to file a brief on the question of the validity of the Blue Ridge bond scrip if the court is to pass upon that question in this case.

Yours truly, WM. A. BARBER.

(Copy.)

CLEVELAND, O., *December* 14, 1899.

WM. A. BARBER, Esq.,
35 Nassau Street, New York City.

DEAR SIR: I have your favor of the 13th inst. and note contents. As I look at it, the principal question between the parties in the case of Wesley *vs.* Eells is the validity of the so-called revenue bond scrip. This validity I have so far contested with success, and shall contest it in my argument before the Supreme Court. Personally I shall be glad to have any other parties interested file their briefs and arguments against the validity of this scrip, in support of mine.

I do not see how other counsel can appear in this case, except as my associates and nominally for the defendant, of course, with the understanding that no fee be charged the defendant for their services.

If you care to prepare brief and argument on the point referred to, and submit me copy before the hearing, on the above understanding, I shall be glad to examine it, and will then consent to its filing, unless it then seems to me manifestly improper and injurious to my client to do so, which contingency I can hardly regard as possible. If this is satisfactory to you, I shall be glad to furnish you copy of my own brief so soon as the same is ready for delivery, which will be shortly.

Truly yours,

(Signed) A. ST. J. NEWBERRY.

(Copy.)

CLEVELAND, O., *December* 16, 1899.

WM. A. BARBER, Esq.,
35 *Nassau Street, New York City.*

DEAR SIR: I have consulted with my client in regard to your request that you be allowed to appear before the Supreme Court in the case of Wesley *vs.* Eells. Mr. Eells says that, as I won the case in the court below, he is satisfied to entrust his interests to my hands in the Supreme Court also, and does not see the need of additional counsel.

It is, however, at least possible that other counsel might be able to add something to the strength of our case, either in matter cited or manner of statement, and I should, of course, be glad to have this done. If you care to prepare a brief and argument in support of the decision of the circuit court, and submit it to me, I will carefully examine it and then decide whether to consent to its filing, and will then give such consent unless the brief then seems to me improper and injurious to my client's interests. Mr. Eells has given me authority to use my discretion in the matter up to this extent, but no further.

Truly yours,
(Signed) A. ST. J. NEWBERRY.

(Copy.)

THE RALEIGH, WASHINGTON, D. C.,
January 6, 1900.

A. ST. J. NEWBERRY,
Atwater Building, Cleveland, Ohio.

DEAR SIR: I inclose herewith copy of notice and motion on behalf of J. D. M. Shaw for leave to file brief and submit argument in case of Edward B. Wesley *vs.* Howard P. Eells.

Kindly sign acceptance of service on inclosed postal card and return to me.

Very truly yours,

(Signed) WM. A. BARBER.

Inclosures.

EDWARD B. WESLEY
vs.
HOWARD P. EELLS.

Due service of notice and motion on behalf of J. D. M. Shaw for leave to file brief and submit argument in above-stated case accepted this — day of January, 1900, and copy retained.

(Copy.)

CLEVELAND, O., *Jan.* 8, 1900.

WM A. BARBER, Esq.,
The Raleigh Hotel, Washington, D. C.

DEAR SIR: Your favor of the 6th instant, with copy of motion in Wesley *vs.* Eells case, is received and contents are carefully noted.

The filing of a motion on such grounds and your attack on the good faith of my client and of myself is rather a surprise to me, after our previous correspondence and my agreement to allow you to file a proper brief in the case. At least this is not the sort of practice to which I have been accustomed.

Very truly yours,

(Signed) A. ST. J. NEWBERRY.

No. 176.

Brief of Newberry for Appellee

Filed Jan. 15, 1900.

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JAMES H. MCKENNEY

BRIEF AND ARGUMENT FOR APPELLEE.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1899.

No. 176.

EDWARD B. WESLEY, APPELLANT,

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HOWARD P. EELLS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

(17,237)

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SUPREME COURT OF THE UNITED STATES

No. 176.

EDWARD B. WESLEY, APPELLANT,

vs.

HOWARD P. EELLS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

ARGUMENT OF A. ST. J. NEWBERRY, SOLICITOR FOR APPELLEE.

I.

This is an action for the specific performance of an admitted contract between the appellant and appellee, for the sale and purchase by them respectively of certain property, known as Agricultural Hall, in the City of Columbia, State of South Carolina, which property is fully described in the Bill. The facts in regard to the making of the contract, are admitted, and a copy of the contract is attached to the stipulation. (Record page 23.)

After entering into the contract the appellee, on examination of the real estate titles, discovered that there appeared to be outstanding and unsatisfied a large mortgage from one J. W. Alexander to the State of South Carolina, said mortgage having been given for the unpaid remainder of the purchase price of the property, when bought by Mr. Alexander from the State. On account of the existence of this encumbrance the appellee has refused to complete his contract and pay the purchase price.

The appellant claims that the mortgage in question has been extinguished, by a tender to the proper officers of the State of South Carolina, of a sufficient amount of what is known as revenue bond scrip, an obligation of the State of South Carolina, and receivable for all dues payable to it, and that under the laws of the State of South Carolina, this tender destroyed the lien of the mortgage, and the same is no longer in force, and the title to the premises is therefore clear.

There is no controversy between the appellant and appellee in this cause, as to the facts relating to the transaction between them, nor as to the acts of the appellant in making a tender of the revenue bond scrip. The facts which led to the possession by the appellant of this revenue bond scrip, have been fully passed upon by the Supreme Court of the United States, in two cases which are cited in the stipulation aforesaid, and in many cases in the State of South Carolina, all of which are also cited in said stipulation. Further controversy about such facts would merely produce delay and expense, and could lead to no result in favor of the appellee. He has therefore admitted these facts, in so far as they appear to have been established of record, and argument will be confined to the legal questions connected with the creation of this revenue bond scrip.

II.

In the light of the South Carolina Statute cited in the stipulation, (Record page 12) and of the decision of the Supreme Court of South Carolina in Salinas vs. Ellis, 26 S. C. 337, it does not seem to us questionable, that the tender made by Mr. Alexander extinguished the lien of this mortgage, provided the revenue bond scrip so tendered was valid and receivable for dues to the State of South Carolina. We claim however, that this revenue bond scrip was in its inception invalid and unconstitutional, constituted no claim against the State of South Carolina, and that its tender was a mere nullity.

The act of the Legislature of South Carolina, passed 2d March, 1872, which authorized and required the State Treasurer to execute and deliver "Treasury Certificates of Indebtedness of the State of South Carolina (styled Revenue Bond Scrip)" is in violation of Article I, Section 10, of the Constitution of the United States, which declares that no State shall emit bills of credit, or make anything but gold and silver coin a tender in payment of debts, and is null and void.

In the cases of The State of South Carolina ex relatione, E. F. Gary vs. Niles G. Parker, State Treasurer, and Dupre vs. County Treasurer, which were proceedings to enjoin the State and County Treasurers from receiving the said scrip for past due taxes, and for taxes thereafter to be collected, before Willard, A. F., of the Supreme Court, in 1873; it was adjudged that the Act of 2d March, 1872, was unconstitutional and void, and that the scrip issued thereunder was illegal; and the Court ordered that the State and County officers be enjoined from receiving the said scrip in payment of taxes and from paying out the same.

In the case of The State ex relatione R. C. Shiver, J. P. Southern et al, vs. S. L. Hoge, Comptroller-General (4 S. C., 185), which was an application to the Supreme Court of the State for a mandamus to compel the Comptroller-General to levy and collect the tax for the redemption of the Revenue Bond Scrip as provided by Section 4 of the Act of 2d March, 1872; the Court refused to grant the mandamus.

The opinion of the Court was delivered 18th April, 1873, by Moses C. J. Of the case, State ex rel. Gary vs. Parker, stated above, it is said: "The judgment which stands in full force, and, until reversed, should be accepted as the law by which the State and County officers connected with the levy and collection of taxes must be governed, holds the emission of the scrip void for its repugnance to the Constitution of the State and of the United States. * * * The respondent, not only insisting on the cause heretofore noticed, submits that the said Act is null and void, in that it is repugnant to the Constitution of the United States, which ordains that no State shall emit bills of credit, or make anything but gold and silver coin a tender in payment of debts. A careful consideration, induced by the large pecuniary interests involved in the question, together with the fact that provisions both of the State and United States Constitutions have been brought into its discussion, has satisfied us that the Act, so far as it authorizes the emission of Revenue Scrip, is in violation of the clause of the Constitution of the United States, already referred to.

"The argument which holds it valid as a subsisting obligation, and repels the character of a bill of credit, under which it is classed by the respondent, seems to rest upon the fact that it was not designed to circulate as money. The opinion of Mr. Justice Willard, in State ex rel. Gary vs. Parker, Treasurer and Dupre vs. County Treasurer, which was brought to our notice in the case before us, and which will be reported with it, is so full and comprehensive on the point as to leave little space for addition or enlargement. It is not because the paper circulates from hand to hand in a community like money that it is to be held a bill of credit, nor does the fact of currency so constitute it. A State might well make the coupons attached to its bonds receivable for taxes, without subjecting them to the disabilities of bills of credit, as used in the Constitution, even although they might readily pass in payment of debts, or for the purchase of commodities. The design to create a circulating medium would be wanting. If, however, the intention to create a currency is apparent from the whole scope of the Act, the emission is a bill of credit, within the terms of the Constitution. To the many indications in the Act to show the intended design, which have been pointed out in the opinion of Justice Willard, it might be added, that the Revenue Bond Scrip could never have been intended or proposed as a State security for investment, because it bore no interest, and its value consisted in the fact of its ready capacity and facility in supplying all articles necessary for use or consumption. Its capacity for circulation and its easy convertibility, together with its adaptation to immediate and ready use, would cause a demand for it, which a State bond, although bearing interest, could not command. It is contended that, as this was a provision to meet a debt of the State, the purpose was to furnish a fund for payment, and not a circulating medium. But may not the two co-exist? May not the medium of payment be of such a kind and character as to create in itself a circulating medium? It is not the end which the assumption is to accomplish, but the mode and manner designed and the use contemplated. The State might issue certificates of indebtedness for the redemption of its bonded debt; but if it did so in the form and manner and design proposed by the Act of 2d March, 1872, would they be less obnoxious to the objection urged against the Revenue Bond Scrip,

because they were issued to pay or meet a debt? It is not the purpose of the issue which affects the instrument through which it is made, but the characteristics and incidents which attach to it as a provision and recommendation for a circulating medium."

The opinion of Mr. Justice Willard, above referred to, after stating the definition of the terms "bills of credit," employed in the Constitution of the United States, as settled by this Court, in the cases of Craig vs. Missouri, 4 Peters, 490, and Briscoe vs. Bank, 11 Peters, 257, holds that the Certificates or Revenue Bond Scrip in question are within the definition—because:

1st. They are issued by a State in its sovereign capacity.

2d. That they were to contain a pledge of its faith; and

3d. That they were intended to circulate as money.

The first two propositions are determined by the terms of the Act which required the State Treasurer to issue paper, expressing that the sum therein mentioned is due by the State to the bearer thereof.

That it was the intention of the Act that this paper should circulate as money, is shown by the following considerations:

1st. It was intended that the Revenue Bond Scrip should be issued in the form most usual and convenient to serve as paper money, viz: that of the usual bank or treasury note. The form and denomination were to be determined by the Treasurer and the President of the Railroad Company. The Treasurer is to receive and pay it out from the Treasury, and the President of the Railroad Company is to receive it in such amounts as he should find most convenient for use.

2d. It is based on the credit of the State in its sovereign capacity.

3d. To give it currency, an artificial want is created by making it receivable for taxes.

4th. To keep it in circulation, the Treasurer is authorized to pay it out again after being received, in satisfaction of any claim against the Treasury, except for interest on the public debt.

5th. The pledge of the State is not that the scrip shall be paid, but that it shall be redeemed by means of funds to be raised by a special tax, thus increasing the inducement to give it currency.

6th. The volume of the issue, $1,800,000, as compared with the extent of the commercial transactions of the community in which it was to be placed, is the clearest indication of the intention to make it circulate as money. It was to be placed at once in private hands, and the various provisions of the Act looking to its distribution among the people, precludes the idea that the recipients of this large fund should hold it until redemption, or even that it should be kept together in the hands of a limited number of holders; but the magnitude of the interest in the hands of the first receiver was such as to warrant the assumption that it would become diffused throughout the community.

7th. The authority conferred on those most concerned with its circulation, to issue it in such amounts as would adapt it to the wants of the community is an additional evidence of an intention that the scrip should circulate as money.

The decision in these cases was reconsidered and affirmed in the case of Gary, State Auditor, vs. Parker, State Treasurer, and others as County Treasurers in June, 1873, 4 S. C., 311, in which, by order of the Circuit Court, John P. Southern and others, scripholders, were allowed to intervene as defendants.

In the case of Poindexter vs. Greenhow, (114 U. S., 283-285,) it was decided by this Court that the coupons of the bonds of the State of Virginia, were not "bills of credit" in the sense of the Constitution of the United States, because, although issued by the State on its credit, and made receivable in payment of taxes, and negotiable, so as to pass from hand to hand by delivery merely, they were not intended to circulate as money between individuals and between Government and individuals, for the ordinary purposes of society. The definitions of "bills of credit," as determined in the cases of Craig vs. Missouri, 4 Peters, 410; Briscoe vs. Bank of Kentucky, 11 Peters 257, and Darrington vs. Bank of Alabama, 13 How., 12, are approved and applied:

"'Bills of credit signify a paper medium intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society,' or as made more exact: 'The definition which does include all classes of bills of credit emitted by the Colonies or States is a paper issued by the sovereign power, containing a pledge of its faith, and designed to circulate as money;' and, again: 'To constitute a bill of credit, within the Constitution, it must be issued by a State, on the faith of the State, and be designed to circulate as money. It must be a paper which circulates on the credit of the State, and is so received and used in the ordinary business of life.'"

The coupons were decided not to be bills of credit in the sense of the constitutional prohibition, because, although they are issued by the State, are promises to pay money, and their payment and redemption are based on the credit of the State; they were not issued by the State as a circulating medium or paper currency—as a substitute for money. The grounds upon which this conclusion as to the absence of intention to make the coupons a paper currency, are:

1st. There is nothing on the face of the instrument.

2d. Nor in their form and nature;

3d. Nor in the terms of the law which authorizes their issue;

4th. Nor in the circumstances of their creation or use;

5th. Their being made receivable in payment of taxes is not sufficient to give them this character. They do not become receivable in payment of taxes till they are due, and the design, we are bound to presume, was that they would be paid at maturity. This necessarily excludes the idea that they were intended for circulation at all.

In what respects do the "South Carolina Treasury Certificates of Indebtedness, styled Revenue Bond Scrip," issued under the Act of 2d March, 1872, correspond with the coupons of the Virginia Bonds, and in what respects do they differ?

They correspond in that they are indebtedness, and obligations of the State; they are issued by the State in its sovereign character; they are made receivable for taxes, and their redemption is based entirely on the credit of the State, for as pointed out in the case of Darrington vs. Alabama, (13 How., 12,) although it is provided that a fund for their redemption shall be raised by taxation, the application of the fund so raised rests upon the faith of the State.

They differ in the following particulars:

1st. They are not made payable at any specific time, indeed made payable at all; but are only to be redeemed or retired from year to year (as in the instruments construed to be bills of credit in Craig vs. Missouri.)

2d. They are made receivable in payment of taxes from the time of issue, before even they are required to be redeemed; therein unlike the coupons, which were not receivable for taxes until they are due.

3d. They do not bear interest, being therein unlike coupons, and like Bank or Treasury notes.

4th. They are not only made receivable for taxes, but after they have been so received, may be reissued in satisfaction of all claims against the Treasury, (except for interest on the public debt.)

To determine whether these Treasury Certificates of Indebtedness, issued by the State of South Carolina, were intended to constitute a paper currency or circulating medium, constituting "bills of credit," apply to them the tests applied by the Court to the coupons of the Virginia bonds.

1st. The instruments on their face are bills receivable, or notes of the State of South Carolina.

2d. In their form and nature they correspond with the usual paper currency of the country. They are in the similitude of bank notes and Treasury notes.

3d. The terms of the law, which authorized their issue; by the provisions as to form; by the power given to fix the amount (which was exercised so as to issue notes in as small a denomination as $1.), by their not bearing interest, the placing them in the hands of the President of the Blue Ridge Railroad Company to take the place of the bonds of the Company, and to be used in paying the expenses of constructing the road; the great volume of the issue, which necessitated its being kept in circulation to sustain its value; the provision for its re-issue from the Treasury so often as received, which was to make it circulate and keep it afloat—all indicate the intention to create a paper medium to circulate between individuals and between the government and individuals, and to perform all the functions of money.

4th. The circumstances of their creation and use, as shown in the opinion of Judge Willard, and of the Supreme Court, cited above, are confirmatory of the same intention.

5th. Their being made receivable in payment of taxes from the time of their issue and before they became redeemable.

6th. Penalties are provided for forgery of Scrip, in like manner as for bank and Treasury notes, as was the case in the Act construed in Craig vs. Missouri.

In the case of The State vs. Cardozo, Treasurer, (5 S. C., 297), decided in 1874, the decision in the case of State ex rel Shiver vs. Hoge, as to "bills of credit," is affirmed; but it was held that the "Certificates of Indebtedness," the subject of that suit, were not bills of credit, although made receivable in payment of taxes, because the Act under which they were issued affords no evidence of the intention of the Legislature to create a currency or circulating medium. The certificates in no way increased the obligation of the State, and in fact only constituted another admission by the General Assembly of the particular debt, not paid by the certificate, but remaining due until its satisfcation was unconditionally acknowledged.

The learned Judge before whom this case was heard in the Circuit Court gave particular attention to this question, and decided the case in favor of the appellee upon it. The attention of the Court is respect-

fully called to his full consideration of the questions on pages 34 to 41, inclusive, of the record.

III.

The bonds of the Blue Ridge Railroad Company, in exchange for which said Revenue Bond Scrip was issued, were on their face, guaranteed by the State of South Carolina. This guaranty is unconstitutional and void, and its cancellation, and the surrender and cancellation of the bonds bearing it, furnished no consideration for the issue of said Revenue Bond Scrip. The appellant being a party to the transaction whereby said Scrip was used in exchange for said guaranteed bonds, was chargeable with full notice of the facts, and cannot enforce the Scrip received by him.

The guaranty by the State of the bonds of the Blue Ridge Railroad Company was made by virtue of the Act of 1868, "to authorize additional aid to the Blue Ridge Railroad Company in South Carolina."

1. If the object and intention of the act was to create a public debt of the State, it was void, because not passed by the votes of two-thirds of the members of each branch of the General Assembly, to be recorded by yeas and nays in the journals of each House respectively, and did not levy a tax annually, sufficient to pay the annual interest of such debt, as required by the Constiution of South Carolina. (Art. IX, Sec. 7.)

2. The Legislature had not authority, under the Constitution of the State (Art. IX., Sec. 14), to creat a debt in this form. (This will be discussed under the next point.)

3. The Act authorized the guaranty of the $3,000,000 of bonds only upon the express proviso that "the bonds shall not be used," unless upon the condition that Congress, or private capitalists, shall furnish $3,000,000, or so much as may be necessary in exchange, or upon the security of said bonds. This condition not having been performed, the guaranty of the State never took effect. All those purchasing the bonds of the Blue Ridge Railroad, purporting to be guaranteed by the State, were bound to take notice of the condition contained in the Act, which protected the bonds from being offered in the market at an under rate, and those, who took them at such under rate did not occupy the position of bona fide holders, without notice.

4. To remove this difficulty, the promoters of these schemes induced in the Legislature to pass the Act of 1871 "to promote the consolidation of the Greenville and Columbia Railroad Company and the Blue Ridge Railroad Company," which contained a section repealing this proviso. The repeal of the proviso was part and parcel of the plan to consolidate the two Companies, and the failure of the main object carried with it all the details.

This Act was considered by the Supreme Court of South Carolina, in the case of Gibbs vs. The Greenville and Columbia Railroad Com-

pany (13 S. C., 228), and it was held that "the Act was never accepted by the Greenville and Columbia Railroad Company, or its creditors, and never went into operation in whole or in part; that it must be construed as a whole, and that the object of the Act having failed, each and all of its parts also failed."

The proviso of the Act of 1868 was, therefore, never repealed.

5. The State of South Carolina having placed in the hands of the Blue Ridge Railroad Company, for the purpose of constructing its road, certain bonds, with its guaranty endorsed, with a condition attached to them, the object and effect of which was to prevent their being used until dollar for dollar could be had for them; no liability could accrue against the State upon such bonds until they were issued in pursuance of the condition; and they were delivered in violation of the said condition.

6. The bonds having been issued, in violation of this condition, there was no liability of the State which could create a consideration for the redelivery of them to the State.

The contract of the State, which is claimed to exist, and which is sought to be enforced, is to issue a paper medium of $1,800,000, more than the whole currency required for the State, and which is made receivable for taxes and all other dues to the State; and the effect of enforcing which will be to debase the currency of the State, subvert its financial system, and saddle its people with an enormous debt, for which it has received no equivalent.

And the only consideration claimed to support this contract is the re-delivery to the Treasury of the State, of the bonds illegally and fraudulently issued by the custodians who held them as Trustees.

The appellant, who took the illegal Revenue Bond Scrip in exchange for the illegally issued bonds of the Blue Ridge Railroad, which he had received with notice of the condition upon which alone they were to be used, and which condition was violated, is not entitled to the relief which is granted to bona fide holders of negotiable securities.

The question whether there existed any liability of the State because of its guaranty of the bonds of the Blue Ridge Railroad Company, is determined by the question whether the President of the Blue Ridge Railroad Company had the authority to use the said bonds as he did, the condition precedent upon which alone they were to be used not having been complied with.

The principles which apply to the transaction in question are clearly distinguished from those which have been decided by this Court in relation to bonds issued by counties and municipalities. In these latter cases, it has been decided that where the authority to issue the bonds depends upon the fact of the performance of some condition precedent, as e. g., the vote of the electors of the County, if the bonds contain the recital of that fact, and such recital is made by the persons appointed to decide whether the necessary prerequisite to their issue had been completed, their recital is such decision, and is equivalent to a representation or warranty or certificate on the part of the person so authorized, that every such fact necessary in law to have existed, did exist, to make the bond lawful and binding, and the obligors are estopped, by said recital, from denying the validity of the bonds. But even in such cases, "of course this does not extend to or cover matters of law. All parties are equally bound to know the law; and a certificate reciting

the actual facts, and that thereby the bonds were conformable to law, when judicially speaking they were not, will not make them so, nor can it work an estoppel."

(See Field vs. County of Dixon, 11 U. S., 83, in which all the preceding cases are reviewed.)

In the cases under consideration, the bonds used were the bonds of the Blue Ridge Railroad Company, which was the obligor; the Act of 1868 authorized the Comptroller-General of the State to endorse the guaranty of the State on said bonds, provided that said bonds, or any part thereof, shall not be used unless upon the express condition that, through the Congress of the United States, or private capitalists, a corresponding amount shall be subscribed. The endorsement of the guaranty of the Comptroller-General necessarily preceded the use of the bonds by the President of the Blue Ridge Railroad Company. The Act was in legal effect a special or limited power of attorney by the State of South Carolina to the President of the Blue Ridge Railroad Company to use certain negotiable instruments for which it was contingently liable, only upon the conditions and under the circumstances set forth in the Act which conferred the power. Those dealing with the agent knew that he was acting only by virtue of a delegated power, and were referred to the Act conferring the power. They were bound at their peril to determine whether the acts of the agent were within the scope of the power under which he acted.

The Act did not, as in the case of county bonds, appoint any one to decide that the facts constituting the condition precedent had been performed, and whose recital is such decision.

Nor did the bonds so used contain any recital that such condition had been performed, nor even that such condition had been prescribed. On the contrary, the bonds, although they had endorsed on them "Guaranteed by the State of South Carolina, under the Acts of 1854 and 1868," and recited that, by an Act passed in 1854, the State had granted aid to the said Company upon certain specified conditions, and that said conditions were released by the said Act of 1868, which authorized the guaranty of its bonds, without compliance with the conditions specified in the Act of 1854, the proviso in the Act of 1868, upon which alone the bonds so guaranteed were to be used, is not mentioned.

There was not only no recital that the condition precedent, prescribed by the Act of 1868, had been performed, but the fact that such condition existed was suppressed.

(A copy of one of the said Bonds, with the endorsements, is appended to the statement of facts filed herewith.)

The principles which determine the authority of an agent to issue negotiable paper in the name of the State, are the same as those which determine the authority of an agent who acts under the power of attorney of an individual.

"An individual may, instead of signing with his own hand the notes and bills which he issues or accepts, appoint an agent to do these things for him. And this power may be a general power to draw or accept in all cases as fully as the principal could; or it may be a limited authority to draw or accept, under given circumstances, defined in the instrument which confers the power. But in each case the person dealing with the agent, knowing that he acts only by virtue of a delegated

power, must, at his peril, see that the paper on which he relies, comes within the power under which the agent acts.

"And this applies to every person who takes paper afterwards; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper, cannot be used to establish the authority by which it was originally issued. These principles are well established in regard to the transactions of individuals. They are equally applicable to those of the government. Whenever negotiable paper is found in the market, purporting to bind the government, it must necessarily be by the signature of an officer of the government, and the purchaser of such paper, whether the first holder or another, must, at his peril, see that the officer had authority to bind the government."

The Floyd Acceptance, 7 Wall, 666.

"The holder is bound to ascertain whether the law had been so far followed by the officers as to justify the issue of the bonds. The authority to contract must exist before any protection as innocent purchaser can be claimed by the holders."

Marsh vs. Fulton County, 10 Wall., 683.

"The purchaser is bound to know the law conferring the power to issue bonds on the happening of a contingency."

Town of Coloma vs. Eaves, 92 U. S., 490.

Field vs. County of Dixon, 11 U. S., 83.

Nor can the appellant sustain the position, that when receiving this Scrip from the State Treasurer and the President of the Blue Ridge Railroad Company, he was only called on to examine the Act of 1872, and that said Act "was a recognition by the State of South Carolina that the use that had been made of those bonds was proper, and thereby admitted the State's liability for them."

The recitals of the Act of 1872 were only the declaration by the Legislature that the existence of the $4,000,000 of bonds of the Blue Ridge Railroad Company, guaranteed under the provisions of the Act of 1868, created a liability upon the part of the State, which the Act proposed to meet by the issue of the Revenue Bond Scrip.

If the Act of 1868 was void, because not passed in accordance with the provisions of the Constitution of the State; or if by reason of the use made of these bonds by the Blue Ridge Railroad Company, in violation of the express condition upon which alone the Act authorized their use, the State did not incur a legal liability, as we have endeavored to show, then the declaration of the Legislature, contrary to the law and facts, that such liability existed, did not and could not create such liability against the State.

The recital in the Act of 1872, that there existed a valid liability of the State, because of its guaranty of the Blue Ridge Railroad Bonds, was based upon the assumption that the provision, the compliance with which was a necessary condition precedent to the accrual of the liability, had been repealed, when in fact as well as in law it had not been repealed.

The appellant when he took the Revenue Bond Scrip issued under the Act of 1872, in exchange for the bonds issued under the Act of 1868, was again given notice by the recital of the Act of 1868 in the Act of 1872, that the liability of the State upon its guaranty of those bonds rested upon the provisions of the Act of 1868, which Act was not passed

in accordance with the requirements of the Constitution, and an examination of which would have showed the condition upon which alone such guaranty was to take effect, and which condition had never been complied with or repealed.

If the guarantee of the State, endorsed by the Comptroller-General upon the bonds of the Blue Ridge Railroad Company, under the provisions of the Act of 1868, did not constitute a valid debt of the State, either because the said Act of 1868 was not passed in accordance with the provisions of the Constitution; or because of the non-performance of the express condition precedent prescribed in said Act, upon compliance with which only could the State become liable upon its guaranty; then the Legislature could not by the declaration in the Act of 2d March, 1872, that such antecedent liability did exist, create a debt which could be binding upon the State by way of compromise or otherwise; for this would be to convert what was without legal authority into a valid obligation; and thus create a debt in a mode other than that authorized by the Constitution.

This would be to ignore the vital distinction between a State and the Legislature of a State, and to hold that the very body whose power to contract debt is restricted by the Constitutional proviso, could, by these means, evade and utterly disregard such restrictions.

(See Bond Debt Cases, 12 S. C., 201; Whaley vs. Gaillard, County Treasurer, 21 S. C., 560, and cases cited.)

IV.

The Act of March, 1872, is null and void, because in violation of the Constitution of the State of South Carolina.

The whole department of finance is settled by Article IX, of the State Constitution—"Finance and Taxation." The expenses and expenditures of the State are divided into two classes: "ordinary" and "extraordinary." The provisions for ordinary expenses are contained in Sections 3 and 4.

The provisions in relation to extraordinary expenditures are as follows:

Sec. 7. "For the purpose of defraying extraordinary expenditures, the State may contract public debts; but such debts shall be authorized by law for some single object, to be distinctly specified therein; and no such law shall take effect until it shall have been passed by the vote of two-thirds of the members of each branch of the General Assembly, to be recorded by yeas and nays in the journals of each House respectively; and every such law shall levy a tax, annually, sufficient to pay the annual interest of such debt.

Sec. 10. No Scrip, certificate, or other evidence of State indebtedness, shall be issued, except for the redemption of stock, bonds, or other evidences of indebtedness previously issued, or for such debts as are expressly authorized in this Constitution.

Sec. 14. Any debt contracted by the State shall be by loan on State bonds, of amounts not less than Fifty Dollars each, on interest payable within twenty years after the final passage of the law authorizing such debts. A correct registry of all such bonds shall be kept by the Treasurer in numerical order, so as always to exhibit the number and amount unpaid, and to whom severally payable.

These several sections have been construed by the Supreme Court of the State of South Carolina.

(See State vs. Hayne, 4 S. C., 403; State vs. Columbia, 6 S. C., 1; The Bond Debt Cases, 12 S. C., 200; Whaley vs. Gaillard, County Treasurer, 21 S. C., 560.)

1st. The object proposed to be provided for by the Act of 1872, does not fall under the head of "extraordinary expenditures."

The declared object of the Act was to procure the cancelling of a guaranty by the State on certain bonds of the Blue Ridge Railroad Company, and the re-delivery of said bonds.

It is contended that it was to save the State from a liability, but a guaranty on a bond can in no sense be called an "Expenditure," and the Legislature had no authority to create a debt by guaranty. Their power was limited to creating debt for expenditures, and there was no expenditure in the case.

We submit that the guaranty on the bonds of the Blue Ridge Railroad Company, authorized by the Act of 1868, was unconstitutional and void, and could form no ground of debt or expenditure for the Act 2nd March, 1872, to operate upon.

2d. Section 10 authorizes the issue of "scrip, certificate, or other evidence of State indebtedness," only for the redemption of stock, bonds, or other evidence of indebtedness "previously issued," or for such debts as are expressly authorized by the Constitution; the first clause refers to evidence of indebtedness issued previous to the adoption of the Constitution; second clause refers to debt other than such as was provided for in Section 7.

The guaranty of the State on the bonds of the Blue Ridge Railroad, not then due, even if constitutional, created only a contingent liability, not yet a debt—and cannot be considered evidence of indebtedness. So that the "scrip" was not for the redemption of stock, bonds or other evidence of indebtedness previously issued, or authorized by the Constitution, and therefore cannot be sustained under Section 10.

3d. The limitations as to the form of the debt prescribed in Section 14, are wholly disregarded. The scrip is not a bond, but a bill receivable. It is for amounts less than $50; it is not on interest; it is not payable within twenty years from the passage of the law, and is not made payable at any date; it has not been registered by the Treasurer.

V.

The Acts of 22d October 1873, and 22d December, 1873 which prevented the execution of the provisions of the Act of 2d March, 1872,

were passed by the Legislature of South Carolina after the Supreme Court of the State had declared that the said Act was unconstitutional and void. (Auditor vs. Treasurer, 4 S. C., 311.)

They constitute part of the general policy and plan adopted by the State in the management of her finances.

If the Act of 2d March, 1872, is void, as we have endeavored to show in this argument, the Acts repealing its provisions, or inconsistent with them, are not unconstitutional and void.

The appellee therefore submits, that the so-called Revenue Bond Scrip did not constitute, in the hands of the plaintiff or of Mr. Alexander, his agent, the valid obligation of the State of South Carolina, at the time the same was tendered; that consequently said tender did not extinguish the lien of the mortgage upon the premises in the Bill described; that said mortgage is still in force and constitutes a lien upon said premises, and that, under his contract with appellant, he was justified in refusing to accept a deed of said premises and make payment therefor as in his contract provided. Having justifiably declined to carry out his contract for good causes then existing, the appellee cannot now be forced to do so, and he should therefore be dismissed with his reasonable costs.

All of which is respectfully submitted,

A. ST. J. NEWBERRY,
Solicitor for Appellee.